CR 2022/82 - Australian Construction Industry Redundancy Trust - employer contributions

Status: **legally binding**

Class Ruling

Australian Construction Industry Redundancy Trust – employer contributions

Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Table of Contents **Paragraph**

What this Ruling is about

1. This Ruling sets out the fringe benefits tax (FBT) consequences for employers who make a contribution to Australian Construction Industry Redundancy Trust (ACIRT) for an employee who is a member of ACIRT.

2. Details of this scheme are set out in paragraphs 7 to 21 of this Ruling.

3. All legislative references in this Ruling are to the *Fringe Benefits Tax Assessment Act 1986*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are an employer who makes contributions to ACIRT under an industrial instrument on behalf of an employee who is a member of ACIRT.

When this Ruling applies

5. This Ruling applies from 1 April 2022 to 31 March 2027.

Status: **legally binding**

Previous rulings

6. This Ruling replaces Class Ruling CR 2017/36 *Fringe benefits tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)*, which applied to the payment of contributions by an employer to ACIRT during the period from 1 April 2017 to 31 March 2022.

Ruling

7. A contribution an employer makes to ACIRT is an exempt benefit under section 58PA where the:

- contribution is made under an industrial instrument, such as the Building and Construction General On-Site Award 2020 (BCGOA) or an enterprise bargaining agreement (EBA) that contains a clause which allows employers to make such contributions, and
- contribution is either
  - made for the purposes of ensuring an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met, or
  - for the reasonable administrative costs of the fund.

Scheme

8. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Australian Construction Industry Redundancy Trust

9. Employers are required to provide redundancy entitlements for their workers pursuant to various awards and agreements, of which the BCGOA is the predominant award. Employers may choose to meet their obligation to fund worker redundancy entitlements by the payment of contributions to ACIRT.

10. ACIRT is an Australian-resident trust fund governed by a trust deed, which established the fund in Australia. The central management and control of the fund is in Australia.

11. The trustee of the ACIRT is ACIRT Pty Limited, an Australian-resident company.

12. ACIRT accepts contributions from employers to fund each worker's individual redundancy benefit. ACIRT and the employers execute an agreement called a 'Deed of Adherence' which sets out the amount to be contributed by the employer in respect of each worker. This can be calculated by reference to the greater of either the:

- 'minimum contribution' rate (as defined in the ACIRT Trust Deed), or
- rate provided for in an industrial instrument.

Status: **legally binding**

13. An employer's obligation to participate in ACIRT may be required or may be optional under an industrial instrument. Employers can participate in ACIRT by making application to the Trustee for admission, completing a Deed of Adherence and meeting the terms of the fund.

14. Clause 41 in the BCGOA deals with redundancy matters and how contributions are to be made. Clause 41.3(a) of the BCGOA states '[a] redundant employee shall receive redundancy/severance payments, calculated as follows ...'.

15. Clause 41.4 in the BCGOA states the following in relation to Redundancy pay schemes:

> (a) An employer may offset an employee's redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.
>
> (b) Provided that where the employment of an employee is terminated and:
>
> (i) the employee receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay in this 41.3 and the amount of the redundancy pay scheme benefit the employee receives which is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under clause 41.3 then the employee will receive no redundancy payment under clause 41.3; or
>
> (ii) the employee does not receive a benefit from a redundancy pay scheme, contributions made by an employer on behalf of an employee to the scheme will, to the extent of those contributions, be offset against the liability of the employer under clause 41.3, and payment to the employee will be made in accordance with the rules of the redundancy pay scheme fund or any agreement relating thereto. The employee will be entitled to the fund benefit or the award benefit whichever is greater but not both.
>
> (c) The redundancy pay scheme must be an Approved Worker Entitlement Fund …

16. Most EBAs contain clauses that deal with both the payment by the employer to ACIRT and also the payments that are required to be made to an employee being made redundant. It is generally worded in the following manner:

> Redundancy or redundant means the termination or cessation of employment of an Employee for any reasons.
>
> In respect of redundancy benefits:
>
> (a) The Company agrees to make redundancy contributions in respect of Employees covered by this Agreement to the Australian Construction Industry Redundancy Trust (ACIRT) in accordance with Appendix C of this agreement.
>
> The entitlement for apprentices will be in accordance with Appendix D of this Agreement.
>
> The contributions shall be paid monthly into ACIRT in accordance with the requirements of the Trust.
>
> (b) Employees will be entitled to a redundancy benefit for each week of service with the Company being the greatest of the following amounts
>
> (i) the amount payable by the Company to ACIRT in accordance with this Agreement, or
>
> (ii) the amount prescribed by the relevant Award, and/or

(iii) any amount prescribed or awarded by a relevant industrial tribunal.

Where there is a higher entitlement under (b)(ii) and or (b)(iii) of this clause, the Employee will be paid direct this entitlement minus the balance that has already been paid into ACIRT by the Company for this period of employment.

17. The trustee of ACIRT establishes and maintains a Member Account in respect to each employee admitted to the membership of ACIRT. This account shows contributions to the fund for that employee by the employer and amounts credited or debited to the account.

18. Payments can be made out of the income or the capital of ACIRT to satisfy the objects of ACIRT.

19. Payments from amounts received by ACIRT as contributions from employers can only be applied for specific purposes, including:

- paying entitlements to employees or death benefits to dependants
- reimbursing employers who have paid entitlements direct to employees in respect of whom contributions are made
- returning contributions to employers
- to pay an employment termination payment, to transfer contributions to another worker entitlement fund, or
- to pay reasonable administrative expenses of the fund.

20. Payments from ACIRT to employees will be payable where the employee is made redundant and to dependants of the employee in the event of the employee's death.

21. In practical terms, payments of benefits from ACIRT to employees will be made in one of, or both, of the following ways:

- from ACIRT directly to the employees, or
- from ACIRT to the employer in order to reimburse the employer who has made a payment to an employee in respect of their entitlement, and the employer has already made a contribution to ACIRT representing that employee's entitlement.

When this Ruling does not apply

22. This Ruling does not apply where the applicable industrial instrument does not contain a clause which allows the employer to make contributions on behalf of the employee to an approved worker entitlement fund to ACIRT.

Commissioner of Taxation
7 September 2022

Status: **not legally binding**

Appendix – Explanation

This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Table of Contents **Paragraph**

Exempt benefits – worker entitlement contributions

23. Section 58PA states:

> If:
>
> (a) a person makes a contribution to an approved worker entitlement fund; and
>
> (b) the contribution is made under an industrial instrument; and
>
> (c) the contribution is either:
>
> (i) made for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met; or
>
> (ii) for the reasonable administrative costs of the fund;
>
> the contribution is an exempt benefit.

24. Exemption under section 58PA requires that all paragraphs contained therein are met and, consequently, a failure to meet the requirements of one or more of those paragraphs means the exemption under the provision does not apply.

25. Therefore, to determine whether the payment of a contribution to ACIRT is an exempt benefit under section 58PA, it is necessary to consider the following questions:

- Is ACIRT an approved worker entitlement fund?
- Is the contribution made under an industrial instrument?
- Is the contribution made to ensure that an obligation to make leave payments, or payments when an employee ceases employment, is met or for the reasonable administrative costs of the fund?

Is ACIRT an approved worker entitlement fund?

26. Section 58PB sets out the conditions that must be met in order for ACIRT to be an 'approved worker entitlement fund'. Subsection 58PB(2) states '[a] fund is also an

approved worker entitlement fund if: (a) the fund is endorsed as an approved worker entitlement fund under subsection (3) …'.

27. Subsection 58PB(3) states:

> The Commissioner must endorse a fund as an approved worker entitlement fund if:
>
> (a) the fund is entitled to be endorsed as an approved worker entitlement fund (see subsection (4)); and
>
> (b) the fund has applied for the endorsement in accordance with Division 426 in Schedule 1 to the *Taxation Administration Act 1953*.

28. ACIRT has been endorsed as an approved worker entitlement fund since 28 June 2011, pursuant to the transitional provisions under the *Tax Laws Amendment (2011 Measures No. 2) Act 2011*. It has further been determined that the fund is still entitled to be endorsed as an approved worker entitlement fund pursuant to the conditions outlined in subsection 58PB(4).

29. As the requirements of subsection 58PB(2) are met, ACIRT is an approved worker entitlement fund.

Is the contribution made under an industrial instrument?

30. Paragraph 58PA(b) requires that the contribution to an approved worker entitlement fund 'is made under an industrial instrument'.

31. Subsection 136(1) defines 'industrial instrument' as meaning '... a law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law'.

32. Employees engaged under the terms of awards, orders, determinations or enterprise or industrial agreements have their rights either sanctioned directly by Commonwealth, State or Territory legislation or by an industrial court authorised by statute to make and enforce such employee rights. The ensuing obligations of employers towards such employees are similarly legislatively or court sanctioned. It is accepted that both the BCGOA and individual EBAs that are appropriately sanctioned meet the definitional requirements of industrial instruments.

33. In the Revised Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No. 2) Bill 2005 (EM), which removed the previous conditions in paragraphs 58PA(b) and 58PA(c) that contributions to an approved worker entitlement fund must be 'required' under an industrial instrument, it is stated:

> 8.10 Industrial instruments, such as awards, may include an obligation for employers to provide leave or redundancy payments for employees based on the length of an employee's service. Employers may have the option of providing for the payments themselves, or by way of making contributions to a worker entitlement fund. Thus the wording of these industrial instruments may make contributions to a worker entitlement fund optional. The industrial instruments may not require employers to meet their obligation to provide those payments by way of a contribution to a worker entitlement fund.
>
> 8.11 Prior to these amendments, contributions needed to be 'required under an industrial instrument' in order for the contribution to be eligible for an exemption from FBT. As a result, employers may be liable to pay FBT on their contributions to approved worker entitlement funds in cases where the contributions are optional, but not required, under the relevant industrial instrument.

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34. The EM indicates that although current paragraphs 58PA(b) and (c) no longer specify that the relevant industrial instrument contains a legal requirement for the contribution to be made to an approved worker entitlement fund, there still has to exist (for the purposes of the aforementioned paragraphs) some logical link between the industrial instrument and the subsequent contribution to the fund.

35. The Administrative Appeals Tribunal (AAT) case of *Eldersmede Pty Ltd and Ors and Commissioner of Taxation* [2004] AATA 710 examined what the word 'under' may mean in various legislative and contractual contexts. After examining various earlier court decisions, the AAT at [69] stated:

> The authorities to which we have referred indicate that, in various contexts, the word "*under*" in the expression "*under a scheme*" in s. 270(10)(1) of the [*Income Tax Assessment Act 1936*] may mean "*pursuant to*", "*in accordance with*", "*provided for in*", "*by virtue of*", "*authorised or required by*", "*directly effected by*" or "*through the operation of, as a matter of legal effect*". In saying this though, we are mindful of the High Court's warning in *Minister for Immigration and Ethnic Affairs v Guo* [[1997] HCA 22] that it is dangerous to treat a word phrase as synonymous with a statutory term and we do not propose to do so. What is common to all these authorities is that there must be a sufficient nexus or connection between two matters so that one may be said to be under the other or to have occurred under the other.

36. As such, for a contribution to an approved worker entitlement fund to be said to have been 'made under an industrial instrument', for the purposes of paragraph 58PA(b) there must exist a 'sufficient nexus or connection' between that contribution and an industrial instrument.

37. The Full Federal Court in *J & G Knowles v Commissioner of Taxation* [2000] FCA 196, in the course of examining the question of whether on the facts of the case there was a sufficient or material connection or relationship between a 'benefit' and 'employment', at [29] stated:

> To put the matter another way, although the process of characterising the benefit provided in a particular case can involve questions of fact and degree, it is not sufficient for the purposes of the Act merely to enquire whether there is some causal connection between the benefit and the employment: see *Commissioner of Taxation v Rowe* (1995) 60 FCR 99 at 114 and 123. Although Brennan, Deane and Gaudron JJ observed in *Technical Products* (at 47), that the requisite connection will not exist unless there is "some discernible and rational link" between the two subject matters which the statute requires to be linked, as was pointed out by Dawson J (at 51), the connection must be "material".

38. It is considered, therefore, that for a 'sufficient nexus or connection' to exist between a contribution and the relevant industrial instrument, the link between the 2 must have 'some discernible and rational link' that is 'material' in its extent.

39. When an industrial instrument specifically allows the option for employers to make a contribution to an approved worker entitlement fund, there is a ready nexus between an employer's obligations arising under an industrial agreement and the subsequent meeting of such obligations by that employer. Consequently, contributions made by employers to an approved worker entitlement fund such as ACIRT in such circumstances can, indeed, be said to have been 'made under an industrial instrument' (up to the extent of the contribution authorised by that instrument) and the requirements of paragraph 58PA(b) will be met.

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Is the contribution made for the required purposes?

40. Paragraph 58PA(c) requires that the contribution is either for the:

- purpose of ensuring that an obligation that arises under the industrial instrument to make leave payments or payments when an employee ceases employment is met, or
- reasonable administrative expenses of the fund.

41. This requirement will be met where the employer makes a payment of a contribution to ACIRT to enable the obligation to make a payment when an employee ceases employment under the relevant industrial instrument to be met. Employers are considered to make the contributions to ACIRT for either of these purposes when this arrangement is specifically mentioned in the relevant industrial instrument (such as the BCGOA or an EBA that specifically allows employers to make a contribution to an approved worker entitlement fund).

Conclusion

42. When the 3 conditions outlined in section 58PA have been met, the payment of a contribution to ACIRT by an employer will be an exempt benefit.

Status: **not legally binding**

References

Previous Rulings/Determinations:

CR 2012/84; CR 2017/36

Legislative references:

- FBTAA 1986 58PA
- FBTAA 1986 58PA(a)
- FBTAA 1986 58PA(b)
- FBTAA 1986 58PA(c)
- FBTAA 1986 58PB
- FBTAA 1986 58PB(2)
- FBTAA 1986 58PB(3)
- FBTAA 1986 58PB(4)
- FBTAA 1986 136(1)
- Tax Laws Amendment (2011 Measures No.2) Act 2011

Cases references:

- Eldersmede Pty Ltd and Ors and Commissioner of Taxation [2004] AATA 710; 2004 ATC 2129; 56 ATR 1179; [2005] ALMD 1375; [2005] ALMD 1385
- J & G Knowles v Commissioner of Taxation [2000] FCA 196; 96 FCR 402; 2000 ATC 4151; 44 ATR 22

Other references:

- Revised Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No.2) Bill 2005

ATO references

NO:	1-U4IVTB4
ISSN:	2205-5517
BSL:	SEO
ATOlaw topic:	Fringe benefits tax ~~ Exempt benefits ~~ Other exempt benefits ~~ Other